UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| FREE SPEECH COALITION, INC., et al., | ) | 09-cv-04607 |
| Plaintiffs, | ) | Philadelphia, PA |
| | ) | September 28, 2017 |
| vs. | ) | 1:59 p.m. |
| THE HONORABLE ERIC H. HOLDER, JR., | ) | |
| Defendant. | ) | |

TRANSCRIPT OF ORAL ARGUMENT
BEFORE THE HONORABLE MICHAEL M. BAYLSON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs: J. MICHAEL MURRAY, ESQUIRE
BERKMAN, GORDON, MURRAY & DEVAN
55 Public Square, Site 2200
Cleveland, OH 44113

For the Defendant: KATHRYN WYER, ESQUIRE
U.S. DEPT. OF JUSTICE, CIVIL DIVISION
20 Massachusetts Avenue
Washington, D.C. 20530

Audio Operator: JANICE LUTZ

Transcribed by: DIANA DOMAN TRANSCRIBING, LLC
P.O. Box 129
Gibbsboro, New Jersey 08026-0129
Phone: (856) 435-7172
Fax: (856) 435-7124
Email: dianadoman@comcast.net

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

# I N D E X

(The following was heard in open Court at 1:59 p.m.)

THE COURT: Mr. Murray, Ms. Wyer, how are you all?

MS. WYER: Good afternoon, Your Honor.

THE COURT: Okay, welcome, and I apologize for the delay today but we'll -- but I've left at least an hour and a half for this argument if we need that much time.

Okay, so we're here for re-remand of the Free Speech case, civil action 09-4607. And I see Mary Catherine Roper is here, good afternoon. I thought you were here for the criminal case because we had a free speech issue there too but welcome.

MS. ROPER: I was familiar with that case, of course, but thank you.

THE COURT: All right, good afternoon to you.

Okay, so as I've done in prior arguments, I've sent out a list of questions, so I'm going to basically ask the questions and then I'll give counsel a chance to sum up anything that I didn't raise, and as usual I'll give you some time after today to file a supplemental brief if you want to. But I thought the briefs were very well done and I appreciate all of the intelligence on this interesting issue.,

I gather, Ms. Wyer, the Government did not seek *certiorari* when the Third Circuit revisited this case after the Reed case, is that correct?

MS. WYER: That's correct, Your Honor.

THE COURT: All right. Any particular reason for that or that's -- I mean, that's generally your policy when there's a remand, not to --

MS. WYER: Yes, I don't -- I'm not sure I know the specific reason but I think it is generally the policy that when there is a remand, they allow --

THE COURT: Okay, all right, well, let me just -- some of these questions are more important than others. So, Mr. Murray, let's start with you on question number 1, mootness.

Is plaintiff Hymes or any other plaintiff no longer involved in adult entertainment business and since the complaint are there any other plaintiffs who you know are no longer involved so that their claims would be moot?

MR. MURRAY: Yes, Your Honor, I'll be glad to answer that question, and but first, yes, it's good to see you again. It's been a long time.

THE COURT: Yes, good afternoon.

MR. MURRAY: I want to say that the plaintiffs and I all appreciate all the hard work you've done on this case for all these years. It's been quite a --

THE COURT: Well, it's a very challenging case and it's become more challenging as the Supreme Court has conveyed new learning about the First Amendment. So, can you just pull that microphone a little closer, please.

MR. MURRAY: Your Honor, yes, we have of course remained in contact with all of our clients throughout these proceedings and have reported to them any time something has happened in the case.

And recently Ms. Baumgardner made a point of making sure that she contacted everyone to make sure that we had up to date information.

And all of the plaintiffs, even after these many years, remain committed to their challenges, to these statutes, and they continue to be burdened by them. And even Mr. Hymes is committed to his challenge and has not given up on the possibility of using the Daily Babylon website for -- to talk about the adult industry and to publish images --

THE COURT: Okay, if that's --

MR. MURRAY: -- that would be subject to 2257.

THE COURT: Ms. Wyer, any dispute you want to raise with that?

MS. WYER: Your Honor, the plaintiff as we stated in our brief, the plaintiffs do have a continuing obligation to establish a case or controversy that is live, but we assume that plaintiff's counsel has made those efforts and understands that they are obligated to bring any relevant information --

THE COURT: Well, Mr. Murray just said, you know, he checked and as far as he knows, his clients still have

standing so -- I'm gonna come back to this but you know, both of you declined a, in your briefs that I had raised the issue before the briefing, whether any of you, either of you wanted to reopen the record, and both of you declined. And this is another, this is one small example of it.

I mean if the Government has evidence that one of the plaintiffs is no longer in the business, that should be something we take evidence on if it's disputed, because Mr. Murray says they're still all involved.

So I don't know how I can dispute that if you want to just stand on the record as it exists.

MS. WYER: Well, I --

THE COURT: Pull the microphone real close.

MS. WYER: I understand what you're saying, Your Honor. I think we had made our standing arguments even previously which Your Honor rejected, and I'm not sure that we were very confident that because any such evidence would depend on what plaintiffs maintain and what they say their plans are, and so it would be up to them just simply to say that they do continue to have plans.

I think there are certainly reasons to wonder whether the plaintiffs' burdens are really as great as they have been. Some of the plaintiffs at trial seem to mainly concerned with obligation to keep the records available 20 hours a week which is now no longer an issue, given the Fourth

Amendment judgment that has already been entered.

And we know that some of the plaintiffs were simply confused about what the requirements are and now Your Honor's decision has clarified that. So there is reason to wonder whether they are facing a burden. Certainly those burdens are not as great as they were at the time of trial.

THE COURT: All right, well, we're gonna explore that, but let me go to number 2. So when I made specific findings before under intermediate scrutiny, it appears to me that the Third Circuit accepted those.

Now, the first question is whether you agree with you, but the more important question is whether I can under strict scrutiny, which the Third Circuit said I must now consider, I just use the same findings and just apply strict scrutiny instead of intermediate scrutiny, or do I do something different? Mr. Murray?

MR. MURRAY: Your Honor, first of all, I think that the Third Circuit did not accept all of your findings. They certainly accepted some of them. They made a point of explaining that they needed to do an independent review as an Appellate Court in a First Amendment case, and they in fact actually did reject a couple of findings that I think were important and certainly remain important --

THE COURT: They certainly rejected some of the Fourth Circuit conclusions, and part of that may be because I

was wrong, but part of it may be because of the Patel case that was also cited in the remand order.

But as I understand it, the Fourth Circuit issues are out, that the Government has conceded, and I think I entered judgment in your favor --

MR. MURRAY: Yes, yes.

THE COURT: -- on all of the Fourth Amendment issues. So we're just left with the First Amendment.

MR. MURRAY: Right. And on those issues, for example, Your Honor, one of the things that the Circuit Court did disagree with from Your Honor was on the issue of Dr. Drouin's studies about sexting. Your Honor had found that those studies were really irrelevant and not probative because -- well, for the reasons that Your Honor said in Your Honor's opinion.

But the Third Circuit said that Dr. Drouin, although these statistics -- and you may recall that she, her conclusion was that millions of young adults sext to each other.

THE COURT: Right.

MR. MURRAY: And the Third Circuit said that nevertheless, although these statistics do not provide a precise picture of just how much private sexual imagery is produced in the United States, they are still informative. They demonstrate that there is some substantial amount of

private sexually explicit images that the statutes burden unnecessarily.

So that was a finding that they made.

Then Your Honor also found that the other evidence that we had introduced about other means through the internet for husbands and wives to share intimate images with each other, Your Honor did not find that relevant or persuasive. But the Third Circuit said,

"Plaintiff's evidence of the use of internet communication services for similar purposes also buttresses this finding. Accordingly, we agree with plaintiffs that they had demonstrated the existence of a universe of private sexually explicit images not intended for sale or trade along with, to a limited degree, a universe of sexually explicit images that depict only clearly mature adults."

Along the same lines, with respect to purely private communications, for example, between husbands and wives that would remain in the home, Your Honor indicated that in his findings, that because it didn't seem very possible that any of those would be discovered, that you didn't assign any real weight to that aspect of the case.

THE COURT: Wasn't one of the reasons for some of those findings -- I also found that all of the plaintiffs were involved in commercial businesses.

MR. MURRAY: Yes. Yes, no, that was part of it, and

I don't think the Third Circuit disturbed that.

As I said, the Third Circuit certainly accepted many of the findings that Your Honor made. I'm just pointing out that there were a couple of what I think are fairly important aspects --

THE COURT: Okay.

MR. MURRAY: -- in which, for example, they said,

"Further, we do not agree with the District Court that the difficulty of enforcing the statutes against purely private producers of sexually explicit images counsels in favor of facial validity. As a factual matter, the District Court erred when it accepted that the Government would never be able to enforce the statutes against private producers. Even if the Government could not target such communications, it is no stretch of the imagination for the Government to become aware of such images inadvertently or through the investigation of other suspected crimes.

"More fundamentally, as the Supreme Court stated in United States v. Stevens, the First Amendment protects against the Government. It does not leave us at the mercy of *noblesse oblige*."

So I mean in those respects which go to whether the statute under strict scrutiny is narrowly tailored, those are important aspects of the Third Circuit --

THE COURT: Well, I think you're right about that.

All right, Ms. Wyer, what's your response?

MS. WYER: Your Honor, first of all, it's true that the Third Circuit did accept many, most and almost all of this Court's findings. Particularly I would say the Third Circuit accepted all of the findings relevant to an as applied challenge; for example, the recognition of the plaintiff's minimal burdens in complying with the statutes, the fact that none of the plaintiffs were chilled in producing any such explicit depictions with the exception of the two projects where the plaintiff's goal was to do that anonymously. The fact that all of the plaintiffs were engaged in commercial production --

THE COURT: I don't need you to go through the ones where they agree with me. I want to know what you think about Mr. Murray's argument that there are a couple they did not agree.

MS. WYER: Your Honor, in regard to their evaluation of experts that was in the Third Circuit's over-breadth analysis but ultimately they determined that nothing in the record was sufficient to show substantial over-breadth, even with their recognition that the experts have slightly more weight than Your Honor provided, they still did not find that sufficient.

THE COURT: All right.

MS. WYER: And that was only relevant to over-

breadth.

THE COURT: All right, one of the difficult issues in my view is -- well, let me rephrase this, and this cuts across a lot of other questions.

On the as applied challenge, it is clear that I must now apply strict scrutiny, and a lot of cases, maybe not a real lot, but there are a number of cases that go through that analysis.

On the concept of facial over-breadth, the case law does not appear to be clear as to whether applying strict scrutiny is necessary on over-breadth, or whether some other tests should be used.

Now, there happens to be a recent decision by Justice Souter sitting by designation in the First Circuit called United States v. Thayer, T-H-A-Y-E-R. No? Thayer is the name of the plaintiff, excuse me. Okay. And that opinion was vacated in light of Reed, as the Third Circuit's thinking was in light of Reed.

So one note you might want to make is when you submit something supplemental, is your views of the analysis Justice Souter applied and whether that survives Reed.

It's my impression that the Supreme Court has not explicitly stated a test for facial over-breadth that embraces strict scrutiny.

Ms. Wyer, you have any views on that? Or do you

want to think about that and put it in a post argument brief?

MS. WYER: Your Honor, I do have some views now on that. I believe the over-breadth analysis is still what it is, regardless of the level of scrutiny applied in the, you know, scrutiny and all, as apart from over-breadth. But the over-breadth claim still requires substantial over-breadth. The plaintiff still bears the burden to show over-breadth because after all, over-breadth is unique exception to standing requirements, and the only reason for that exception is because it's the First Amendment context, that the plaintiff still bears the burden.

There's no -- under Virginia v. Hicks the plaintiff always bears the burden in an over-breadth claim, and the analysis --

THE COURT: Well, I think the most recent Third Circuit opinion confirmed that, if I'm not -- I think so.

Go ahead, Mr. Murray, what's your view on that?

MR. MURRAY: Well, I think the Third Circuit in the remand decision said that it was remanding the facial over-breadth precisely because the, whether it's strict or intermediate, scrutiny is relevant to an analysis of that.

And I think what's relevant is that under the over-breadth prong when you're talking about strict scrutiny, a content based statute, the narrowness, the fit between the Government's purpose and the coverage that the statute

provides has to be much tighter and much closer and much more perfect a fit than it does when you're talking about intermediate scrutiny.

And therefore, for all the reasons that we argued and will argue today, that under strict scrutiny test, the statute isn't narrowly tailored for all the reasons the Third Circuit said in its 2015 opinion applying the intermediate scrutiny, suggesting that if strict scrutiny had applied, the statute would not satisfy the narrow tailoring requirement because of its application to --

THE COURT: Okay, but if that's true, then why did the Third Circuit remand over-breadth to me? If that -- if your argument is correct, the Third Circuit would have said since Reed applied, and Reed required strict scrutiny, we therefore find that this statute is over broad?

MR. MURRAY: Because the Court didn't want to reach the merits without giving Your Honor and the parties and the District Court an opportunity to argue under strict scrutiny, because as the Court pointed out, everyone tried the case and presented the evidence and argued it from the framework of intermediate scrutiny.

So it's normal that the Third Circuit would then remand it. Now that the test is different, of course it should go back to the District Court to give Your Honor and the parties and the District Court an opportunity to get a

decision from Your Honor under strict scrutiny. So that makes perfect sense to me.

THE COURT: Okay.

MR. MURRAY: I would have been surprised if they had gone on and ruled on the merits under strict scrutiny without giving Your Honor first an opportunity to apply strict scrutiny in the first instance.

THE COURT: Ms. Wyer, any views on that?

MS. WYER: Your Honor, in my view, where the -- where the over-breadth analysis might be affected is if there were whole categories of applications that were now on the other side of the line so that the substantial analysis was considering something entirely new or different than it is otherwise.

But the two areas of where the plaintiffs argue there is substantial over-breadth is still the private, clearly private depictions between couples in their own home and the clearly mature adult context, and that's where the Third Circuit's analysis in the 2015 decision is still very much relevant because the expert testimony that the plaintiffs provide simply did not establish that over-breadth was substantial.

And so unless there's some change, some drastic change in the -- in what categories we're talking about, the same over-breadth analysis would apply.

THE COURT: All right, well, getting to that, I think you took the position before that the statute didn't apply to private sexual depictions. Isn't that the Government's position?

That a husband and a wife in their own home, they're not covered, and even if they make a video of themselves, the statute doesn't cover that. They can video themselves having sex, the statute doesn't apply. Wasn't that your position?

MS. WYER: Yes, that was the Government's position back in the --

THE COURT: And that's still your position, that's one reason why it's not over broad, right?

MS. WYER: We have not argued that here because the Sixth Circuit had said that it applied and we have been adhering to that ruling. But the Government's position had been that the statutes do not apply where the depiction is not for sale or trade, so purely private depictions of consenting adults made in their own home, they never leave their home, would not be covered.

THE COURT: All right, well --

MS. WYER: But even if they were covered, in the, I believe in the post trial briefing and in the Court's decision that was assumed that they were covered and yet there still was not sufficient evidence of the quantity or substantiality of those kinds of images to make --

THE COURT: Well, do you think I'm free to make a ruling that the statute doesn't cover videos of private sex?

MR. MURRAY: No, Your Honor, the Third Circuit expressly rejected Your Honor's view that, or the Government's view that the statute was not applicable to purely private expression. And they went through an entire analysis and sent the case back on that understanding. The statute they said covers every conceivable sexual image in the entire universe including private expression which the Third Circuit has made it clear is an unconstitutional type of expression, but under intermediate scrutiny, the narrow tailoring requirement was still satisfied. But under strict scrutiny it isn't satisfied.

THE COURT: Well, Mr. Murray, getting to mature adults, I mean didn't the Third Circuit there say that it appeared to them that the statute was over broad because it covered them without any exceptions or other circumstances?

MS. WYER: Your Honor, the Third Circuit, I believe the Third Circuit's statement was to the effect that it did not serve the Government's interest to apply the statutes to depictions that only show clearly mature adults. But it does make a difference here whether you're looking at the as-applied challenge or the over breadth challenge.

I would just make the point that in the as applied challenge, we're still in the situation where none of the

plaintiffs have demonstrated that their depictions or their production has images of only clearly mature adults, and the Court has already made those findings, that say that these plaintiffs do not -- their production does not consist of only purely private depictions or --

THE COURT: Well, maybe not only but we clearly have clear depictions of mature adults. We have testimony from mature adults who were performers.

MS. WYER: Yes, Your Honor, and if the Court -- I mean, this is going ahead to the different alternatives, but if the Court were going to rule in the as applied context that there was a constitutional problem with applying the statutes with respect to their work where the, that only consisted of adults over 30 for example, that might be a ruling in the as applied context.

We have arguments, we believe that there are reasons that that is not a less restrictive or less burdensome alternative, but the Court has the power to make that kind of ruling in the as applied context.

In the over-breadth claim, it's still the situation as the Third Circuit and this Court agree that there was no showing of substantial over-breadth on that basis. Substantial --

THE COURT: But I mean I think this is what your brief argues, but your position is that the plaintiff has the

burden on over-breadth and if I find that the plaintiff even considering that strict scrutiny applies, that the plaintiffs haven't proven over-breadth, that the statute is still completely valid. Is that right?

MS. WYER: Yes, Your Honor. The --

THE COURT: All right. I mean, I want to be sure. I mean that's what you argued in your brief. I just wanted to be sure.

But you're basically conceding that for as applied, I would have to go through another different kind of analysis, is that right?

MS. WYER: Yes, Your Honor, the as applied challenge does require the different strict scrutiny analysis so the analysis would be different. In this case, the statutes are narrowly tailored, and I mean we're jumping ahead to other questions that Your Honor has asked but --

THE COURT: Well, they're narrowly tailored under -- I've said they were narrowly tailored under intermediate scrutiny, okay? But that's out the window now. So I have to rethink and re-analyze the same thing, right? And I know your position is that they still -- you think they -- what I'm gathering from your argument, correct me if I'm wrong, is that you're not quite as adamant that the stature satisfies strict scrutiny on as applied, but you think that it clearly satisfies -- even considering strict scrutiny applies, that

the statute is not over broad as a matter of law. Do I understand that correctly?

MS. WYER: On the second point, yes, Your Honor, because over-breadth is still strong medicine and the Court has, the Supreme Court has still warned against facially invalidating a statute where there are lesser, less extensive remedies. And then if the Court were to hold that the plaintiffs -- that the plaintiffs prevail in their as applied challenge, then there would simply be no need to reach the over-breadth claim at all.

But if the Court, even if the Court goes to the over-breadth claim, there still is not enough evidence, the plaintiffs have not met their burden to show over-breadth. And we do feel very strongly that that continues to be the case.

Now, regarding the as applied challenge, the -- this case is very different from the, than the Casey case that Your Honor asked about. In the Casey case, was considering a facial strict scrutiny analysis of the COPPA statute. And there were there many problems in that statute that are not present here.

For one thing, in the narrow tailoring analysis, the Court was looking at the terminology in the language there where there were references to harmful to minors, there was some --

THE COURT: Well, I don't want to spend a lot of time on the details from the Mukasey case. I agree the facts are different there. In there my former colleague, Judge Reed had wrestled with that case for a number of years, longer than I've had this one.

And they kept talking about filters which you can theoretically use in an internet kind of case. And that was what was a lot of the litigation was back and forth.

But you can't use filters in this kind of a case. But I was surprised that there was even no mention of the case when I think it's the leading Third Circuit, most recent leading Third Circuit case on the general topic of over-breadth and strict scrutiny.

MS. WYER: Well, Your Honor --

THE COURT: Do you think it has no application whatsoever?

MS. WYER: That case did not apply to over-breadth doctrine. It was only looking at strict scrutiny and the analysis --

THE COURT: Okay, well, you're right about that, I think.

Mr. Murray, what's your view of that?

MR. MURRAY: Your Honor, let me respond to what counsel said about the question of mature adults and whether it's as applied or over-breadth.

First of all, the discussion about that was in the as applied section of the opinion.

THE COURT: Right.

MR. MURRAY: And the Court could not have been clearer in its opinion. And I think that it will ultimately doom this statute, unless the Third Circuit's conclusions are rejected.

They said in the as applied challenge, that here the Government's interests in enforcing the statute is to prevent producers of sexually explicit material from depicting minor performers.

But as we stated in the first time, burdening speech involving performers who are obviously adults does not advance the Government's interest in protecting children. Requiring identification and record keeping for clearly mature performers does nothing to prevent children from appearing in sexually explicit materials because by definition, a minor could not be mistaken for a clearly mature adult.

On the next page they say,

"Thus, we reject the Government's contention that age verification for all performers regardless of their actual age always furthers the Government's interest in preventing the sexual exploitation of minors.

"Here, given that the Government's own expert testified that at a certain advanced age no individual could

be mistaken for a minor, the Government has not established that imposing some age cutoff would necessarily undermine the statute's effectiveness in preventing the exploitation of children."

Then they say, "This observation does not mean, however, that the statutes are not narrowly tailored as applied to these plaintiffs. Indeed, time and again, we have stated that under an immediate scrutiny, the Government need not employ the least restrictive or least intrusive needs."

And it's because they employed intermediate scrutiny that notwithstanding what they found, under intermediate scrutiny they wouldn't strike it down.

Indeed, if you look at their footnote number 9 -- and then they pointed out that giving the Government every benefit of the doubt -- and they went through many statistics showing that a high, a substantial percentage of the plaintiffs expression involved people over 30, not entirely, but a lot of them.

And undoubtedly, these figures demonstrate that the number of performers to whom the statutes apply, yet for whom requiring identification does not protect children, is not insignificant.

And so they said, "Even if we accept that the Government prove no more than that" -- in other words that you could confuse somebody up to the age 30 -- "even if you accept

that the Government prove no more than that, and that requiring record keeping for individuals 30 and older does not advance the Government's interest, the evidence indeed demonstrates that a significant proportion of plaintiff's works fall squarely within the statute's permissible scope."

In other words, under immediate scrutiny. But then if you look at footnote 9,

"We express no view as to whether minors in fact could appear to be over 30 years old. Indeed...himself equivocated on this point. However, we need not address whether the Government in a different case and in a different record can prove that requiring identification even for performers who appear over 30 helps protect children."

Well, they don't want to put on -- they've not asked to put on more evidence. The Third Circuit has spoken clearly that on the as applied challenge, if strict scrutiny applies, this statutory scheme is not narrowly tailored, if for no other reason than it applies to clearly mature adults over age 30 or who could not reasonably appear to be minors, and also because there's a substantial amount of private expression that is embraced within the statute. And for that reason, it cannot be deemed narrowly tailored under strict scrutiny.

And so, I mean strict scrutiny is not -- I mean, the test is pretty clear. I mean we all know the test. It's a three-prong test and the Supreme Court has applied it in the

various cases that we think are important, Playboy Enterprises, the Alvarez case, the Entertainment Merchants case involving the video games, Free Speech, Ashcroft v. Free Speech Coalition and the Mukasey case in the Third Circuit.

When you apply those tests and you look at those cases, it seems to us at least to be quite clear, Your Honor, that it fails the narrow tailoring test, it fails the test that the Government has to prove that there was an actual problem with adult film makers using minors, and it certainly fails the least restrictive means test, which of course we haven't gotten to yet and I'm sure we will shortly.

THE COURT: Yes, we will. All right. Briefly, yes, did you want to respond to that briefly?

MS. WYER: Yes, Your Honor. The question though in regard to the age cutoff is the plaintiffs have a threshold obligation to show that the alternatives that they propose meet some plausibility standard, and there also has to be the conclusion that the alternative is less burdensome.

THE COURT: Narrow tailoring, the Government has the burden.

MS. WYER: Well, in the Playboy case the Supreme Court said the Government has the burden once you conclude that the alternative is plausible.

And the Court has also, the Supreme Court has also made clear that the Government's burden is not to bring

forward empirical evidence of what would happen under one alternative or another, and that's where there's a distinction from the Mukasey case where you were looking at internet filters which was a technological alternative where there was something empirically necessary to show whether that alternative was effective or not.

But here this situation is much more similar to the Burson case where the Court recognized that the Court can rely, even in the strict scrutiny context, on legislative history, the history of Court decisions in the past, and simple common sense to evaluate these alternatives.

Now with respect to the age cutoff alternative that the plaintiffs have proposed, I think it is still significant when you look at the trial record that not one single plaintiff who testified in the case said that their burden is gonna be lessened by having requirements apply to some performers and not all.

And when you think about it, when you just use common sense to evaluate that alternative, you have to conclude that having a age cutoff at some point other than age 18 imposes its own burdens because then you have to figure out whether the person is over or under that age cutoff. So you can --

THE COURT: Wait, just excuse me one second.

(Pause)

THE COURT: Sorry.

MS. WYER: And when you look at the testimony of some of the plaintiffs, for example, Ross testified that it was not burdensome at all to keep records for videos. Carol Queen testified that she spent less than 12 hours a year even for all people that she kept records for on 2257 compliance. Marie Levine uses a third-party record keeping service for her records.

And we know that Wilson and Nitke who testified, Wilson on behalf of the Sinclair Institute, the burdens they were describing were largely because of their misunderstanding of what was required, and their failure to understand that purely electronic means can be used to keep track of all these records.

And it's simply such a minimal burden involved here, and the Third Circuit recognized that when you're looking at just the incremental additional burden of keeping additional records when you already have to keep some records, that reduces the burden you were talking about even further.

And the Court in Burson said that there was a point where a burden can be so small that it is simply not of constitutional significance. That is the situation I think here because there's no showing -- there's simply no evidence, or the evidence that we have already shows that there is no significant additional burden --

THE COURT: Well, there was some plaintiffs who complained a lot about the burdens of record keeping, but we'll come back to that in a minute.

Let me just ask briefly on this issue of association standing, I think the Third Circuit said as far as "as applied" that there was some question as to whether the associations had standing. Is that right, Mr. Murray?

MR. MURRAY: Yes. In the -- well, what happened is in the 2015 opinion, the Court said that they did not, we did not have standing in the --

THE COURT: Now you think that's out the window?

MR. MURRAY: Right. And then in the most recent opinion, the Court said that that should be revisited because now that we're applying strict scrutiny or intermediate scrutiny, it affects whether they have standing.

THE COURT: All right. And you I think in your brief demonstrated a lot of their activities that you show were impacted by the record keeping and the other burdens, is that correct?

MR. MURRAY: Yes. And under strict scrutiny, it's no longer necessary to have every single member of the Free Speech Coalition or of the ASMP come in and testify about how the statute affects them individually. Because under strict scrutiny, as all the Supreme Court cases made clear, the Government of course has the burden of proof on all three

prongs of the strict scrutiny test, and it doesn't depend upon individual participation.

The organization itself can represent the interests of its members, regardless of how they differ individually when it comes to how badly they are impacted by the statute.

And so that's why for example the Supreme Court never questioned my client's standing in Free Speech Coalition v. Ashcroft. And that's why the Supreme Court never questioned the standing of the Entertainment Merchants Association which was a trade association for the video people in the video violence case of that case versus Brown.

And by the way, in terms of the burdens, Your Honor, there really -- you know, there's some black letter law here that I think the Government is trying to muddy up. The law is not unclear on the point of the Government has the burden of proving all three parts of the strict scrutiny test. The plaintiffs have no burden. It's all their burden.

And that's number one. And number two, that's what Mukasey points out. The burden is on the Government to prove that the proposed alternatives will not be as effective as the challenge statute.

THE COURT: I think you're right about that.

MR. MURRAY: The other thing is, while we disagree that these statutes are not burdensome, these are criminal statutes. These people face a felony if they make a slight

mistake.

And, Playboy makes it clear that under strict scrutiny, it is no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content based burdens must satisfy the same rigorous scrutiny as its content based bands.

In other words, now that you're under strict scrutiny, all of the discussion of how minimal or how persuasive these burdens are as applying to individual plaintiffs is irrelevant to discussion because under strict scrutiny the Government bears the burden of proving their case as if the whole thing were a complete total ban.

And as I recall in Lorillard, the Supreme Court specifically said there's no such thing as a *de minimis* exception to the First Amendment.

But again, the burdens are crippling on these plaintiffs.

THE COURT: Yes, all right. Now, I just want to turn to my second letter on, of questions, and we can come back to the first one perhaps. But, the first question I have, Ms. Wyer, is it correct that on the record in this case so far, there's no evidence that any primary producer has ever employed a minor in a sexually explicit video or other production.

MS. WYER: No, Your Honor, that's not correct, because everyone who uses a minor in the production of a sexually explicit film or photograph is a producer, under the 2257 statute.

THE COURT: But wait a minute. But do we have in evidence that in the record of this case that any one producer ever actually used a minor? That's the question.

MS. WYER: If Your Honor is --

THE COURT: I'm not talking about child pornography where people go to jail. I'm talking about producers of, who are subject to the statute, who produce sexually explicit videos. Is there any evidence that any one of them has ever used a minor?

MS. WYER: If Your Honor is limiting this question only to plaintiffs, but if it goes anything beyond the plaintiffs, then the premise of the question is simply, if Your Honor is excluding child pornography from the question, then that is kind of a circular question. The child pornographers --

THE COURT: Well, I agree with you, child pornographers, the reason they're child pornographers is because they use children.

MS. WYER: Yes. Yes, Your Honor, but --

THE COURT: But it's broader than the actual plaintiffs in this case. In my mind there is a difference

between producers of adult pornography such as plaintiffs. But the question I have is, I mean, and this is one of the reasons why I'm curious as to why the Government didn't want to reopen the record, because you have the burden. And if you had evidence that adult pornography producers had on some occasions, and I'm not gonna do my homework for you but -- I'm not gonna do your homework, that there was a likelihood that producers had in the past -- there was evidence that producers in the past had employed minors despite this statute, that to me would be relevant.

And the fact that there's nothing in the record about that is also relevant. I think strict scrutiny requires me to ask that question.

MS. WYER: Your Honor, there's two points of disagreement I would raise. One is that the burden that the Government has here can be met without that kind of empirical evidence. The burden can be met simply by the long legislative history that the Third Circuit and this Court have already set forth in previous opinions. It can be met by the very common sense nature of these requirements, which is -- which distinguishes them from cases where the Court has talked about evidence, like the Alvarez case where the problem was the statute involved the medal of valor criminalizing false representations that you got a military medal and --

THE COURT: You know, I'm familiar with that case

and I'm familiar with the voting cases, but I think this is a different kind of a case, I must tell you.

MS. WYER: Your Honor, this is a different kind of a case because there is a long history of the, that Congress repeatedly in every statutory amendment that has been made, and all of that legislative history is already in the statutes saying that there is a problem with child pornography, there is a risk created by the prevalence of usual --

THE COURT: There's no question about that. But --

MS. WYER: -- that is enough to meet the Government's burden on that score --

THE COURT: But wait. On the other hand, as far as our research is concerned, there's no case involving adult pornography that has applied strict scrutiny and upheld the statute, that I'm aware of.

Is that right, Mr. Murray?

MR. MURRAY: I'm sorry, Your Honor, I didn't hear the last part of the question.

THE COURT: There's no Supreme Court case or even a Circuit -- well, no Supreme Court case that applying strict scrutiny in an adult pornography context has upheld a congressional statute limiting it.

MR. MURRAY: I think that's right, Your Honor. I can't think of one --

THE COURT: And the voting rights cases are, they

have survived strict scrutiny, and the Alvarez case has survived strict scrutiny, and that's a more complex case.

MR. MURRAY: No, Your Honor, that didn't survive. They struck down the stolen valor --

THE COURT: All right, yes.

MR. MURRAY: -- as unconsisitutional under the First Amendment.

MS. WYER: Your Honor, the Burson case and the Williams-Yulee case, the statutes there survived, or provisions survived strict scrutiny and those are --

THE COURT: Was that the voting rights case?

MS. WYER: Yes. Those are two examples where the Supreme Court recognized the very common sense nature of the restrictions which is very similar to this situation.

And the Eighth Circuit has upheld under strict scrutiny a similar provision in these statutes in the Anderson case in the 2014.

But the other problem with the question, the premise that there's some sharp dividing line between child pornography and adult pornographers is that the Third Circuit has already recognized that pornography is not a monolithic industry. And that's one of the problems with having the organizational plaintiffs with -- finding that they have standing in the, with respect to the as applied challenges, because there is no monolithic adult entertainment industry,

especially -- and the Trial Court record showed that. The Trial Court record made clear that there were two --

THE COURT: Well, but the statute applies very broadly. I mean, the industry is what it is, but the statute applies to anybody who is producing adult pornography and applies the secondary, so-called producer, who don't actually produce it but distribute it.

So I mean the statute is very broad in that sense. But that will get to one of my questions.

All right, and Mr. Murray, I have a question for you. It's number 3 in my last letter.

You talked about self certification. Now I know there's a category of producers who are allowed to self certify. But you also mentioned industry standards. Now is there any written industry standards that you can cite that would be an acceptable substitute as far as your clients are concerned for the statute?

MR. MURRAY: Your Honor, we do argue that the certification procedure is clearly a less restrictive alternative.

I don't think that Mr. Douglas who is the primarily witness on this testified that there were written standards. What was clear and unanimous by Jeff Douglas, Marie Levine, and Barbara Nitke, universally the adult film industry always, long before 2257, and continuing to the present, always

checked IDs and got model releases and kept IDs to prove and to show that their performers were over 18, and they've always kept them and that's an industry standard, that continues -- and the --

THE COURT: But is it in writing anywhere?

MR. MURRAY: No, but it doesn't need to be in writing, Your Honor, in order for this to be an acceptable less restrictive alternative because think about it. The -- if Congress had permitted all commercial producers, legitimate commercial producers like my plaintiffs, to instead of the burdens of this statute, certifying to the Attorney General in writing yes, we keep and maintain identification of every one of our performers pursuant to our industry standards, the name, the address, their age, and here's where we keep them, here's our name and this is who we are.

Now remember, if they said something along those lines and it was false, that would be a violation of 18 U.S.C. Section 1001, making a false statement.

THE COURT: Well, I'll come back to that.

MR. MURRAY: Much like --

THE COURT: Well --

MR. MURRAY: -- and so why isn't that just as effective as 2257? Because 2257 depends upon --

THE COURT: Well, suppose I were to conclude in this case that if the Free Speech Coalition, which is the named

plaintiff, adopted industry standards as you just said, that would be a factor that I might find applying strict scrutiny warranting determining that the record keeping provisions of the statute were a unconstitutional burden? I mean, would your clients accept that or would you let me know about that?

MR. MURRAY: Well, let me --

THE COURT: Or do you think I have no business doing that?

MR. MURRAY: Here's the problem with that. My clients have no problem. They maintain the records, they'd be happy to --

THE COURT: But you're saying that. I don't know, you're speaking for the Free Speech Coalition, but you're not speaking for the entire industry. And you tell me there is an industry organization and I think that's different than the Free Speech Coalition itself. And the issue is whether they would adopt written standards that would serve as a lesser restrictive alterative.

MR. MURRAY: Yes. And I'm sure the Free Speech Coalition would, and I'm sure ASMP would, but here's the problem, Your Honor.

That's what happened in Playboy Enterprises. And you may recall that in that case the problem was the signal bleed. And the plaintiffs there argued that well, Section 504 of the Act provides that if a customer asks you to scramble

the television channel, then you must do so. And it was argued that that was a less restrictive alternative.

The Government says no, no, that doesn't work because nobody ever uses that. And the District Court said yeah, but you've got to prove that the reason that nobody uses it is because they know about it and reject it.

What if there were adequate notice to the public that they had that option. And the Government -- and the District Court and the Supreme Court affirmed it, said that the Government never proved that that wasn't a plausible alternative.

Now what the District Court did was it struck the statute down but then -- and enjoined it, but then also directed the plaintiffs to send out notices to all of their customers that they have the right to scramble. And Playboy Enterprises said fine, they'll do that.

Well, here's what the Supreme Court said about that. The Supreme Court said,

"The Government finds at least two problems with the conclusion of the District Court. First the Government takes issue with the District Court's reliance without proof on a hypothetical enhanced version of Section 504. It was not the District Court's obligation, however, to predict the extent to which an improved notice scheme would improve Section 504. It was for the Government, presented with a plausible less

restrictive alternative to prove the alternative to be ineffective and Section 505 to be the least restrictive available needs.

"Indeed, to the extent the District Court erred, it was only in attempting to implement the less restrictive alternative through judicial decree by requiring Playboy to provide for expanded notice in its cable service contracts. The appropriate remedy was not to repair the statute, it was to enjoin the speech restriction."

THE COURT: I read that in your brief.

MR. MURRAY: And so the problem is, Your Honor, yes, and you've asked questions. If you could tinker with the statute, would that satisfy many if not all of our concerns. The problem is that I don't know that you have the authority. I think that you have to strike it down --

THE COURT: Well, let me --

MR. MURRAY: -- send it back to Congress --

THE COURT: Well, I'm not sure about that. Let me just ask you, and these are specifically like paragraph 4 in my last letter.

Suppose I found the criminal penalties were unnecessary and over broad? Would your clients find that acceptable?

MR. MURRAY: We'd certainly find it helpful.

THE COURT: Well, all right. What about voiding the

documentation requirements, that at least the rigorous ones and saying as long -- I mean, I agree with you that it's a factor that it's a crime probably in most states, if not, and also the Federal Government, for anybody to employ a minor to appear in a sexually explicit video, all right?

Whether you call it child pornography or I mean, most child pornography, and you may or may not know, but we have a lot of cases of them, they're usually very young children, like under the age of 7 or 8. And it's really not an issue of having, you know, teenagers, saying 13 and above, although there may be some of that as well, but the most common criminal prosecutions are for the really young children.

So, if in recognizing that there still existed -- I mean, it appears to me that the existence of a criminal sanction for employing a minor in one of these is a factor that I can and should consider, right?

MR. MURRAY: Absolutely.

THE COURT: You've argued that. But the question is that it should go beyond that. That is should I, if I also said that I accept Mr. Murray's representation that these producers have kept, and he believes they will continue to keep record keeping, then do I find that's a less restrictive alternative which would allow me -- or require me under strict scrutiny, to void the record keeping requirements of the

statute, which are very, very specific and detailed.

In my view, you know, if you were on behalf of the industry as you put it, were able to provide a written statement of that, I think that would be a factor that might be more likely to persuade me that I should adopt that, at least until Congress acts.

One of the problems I have, to be candid with you, as I think about this, is that if I were to declare, you know, let's say, the day I sign this as unconstitutional and is void and everything else, that some damage could be caused to some producers who might be encouraged to hire teenagers to appear in some of these movies and take a risk that they're not gonna get prosecuted, that they know that child pornography is almost always limited to the 6 and 7 year olds, or even younger, and that teenagers are fair game for so-called adult pornography even though they're not adults because of all the distribution and advertising about teens, and we saw that in the record of this case, how so many producers talk about having teens as their performers. And anybody who knows what the law is, that means they're at least 18 or 19, that if they were 13 to 17, they're teens but they're not legally allowed to perform.

But if I were to declare this statute void as of a certain day, that could mean an influx of teenagers as performers, which in my view would be injurious and I think

that Congress would certainly, the record is clear that Congress did not intend such a thing, and that's one of the reasons why they adopted all these rules.

So, then that gets into the age cutoff. And I've been wrestling with this, and that's one of the reasons one of the questions I asked was whether there were any settlement discussions between you and the Government, because it would seem to me that given strict scrutiny, that both of you ought to be interested in coming to some reproach also to -- the promulgation of an industry standard that was less burdensome but would still protect against the teenagers, that is people 13 to 17, being enticed by money or lack of a job or their parents in some cases, to start becoming performers in pornographic movies.

Okay, please.

MR. MURRAY: A number of things. First of all, the testimony of every plaintiff was unanimous. They condemn it, they would never hire anybody under 18. The industry, to the extent that it is homogeneous, and there is an homogenous industry, is totally against it.

They even put out rewards, you might remember, Judge. The Free Speech Coalition puts out rewards for tips that are brought to their attention which they can turn over to law enforcement if anybody observes some minor appearing in a sexually explicit film.

The penalties for the child pornography prosecution is astronomically higher than the penalty for the 2257. 2257 is only up to five years --

THE COURT: Well, you're right about that, but it's a fact that most child pornography prosecutions are really for young children. You're right the law applies to anything under 18, but those are not the child pornography cases that judges see in Court.

MR. MURRAY: Well, Your Honor, all I can --

THE COURT: But there are, you know, what the industry does is it boasts a lot of these movies, the attraction of them is about teens, and the record of the case clearly established that producers recognized that youthful looking performers sell more videos. That is a fact that I found that was not disturbed on appeal.

MR. MURRAY: Youthful looking adult performers though, Your Honor, and --

THE COURT: Youthful looking 18 or over.

MR. MURRAY: Yes, yes. As a matter of fact, one of the questions you asked is whether there should be a notice on the material that everyone's over 18.

I would direct your attention to Marie Levine's testimony, June 5th I think was the date of her testimony, at pages -- I'll give you the pages in a minute. But she specifically was asked those questions, long before 2257, even

as to the so-called teen porn. Every producer universally and always puts on, in that case the box cover or the DVD, whatever the form is, "all models are over 18."

So that one of your questions was well, about somebody receiving or downloading, would they have to worry about the performers being under 18? No, because the industry standard there again is they always put that on there --

THE COURT: Well, this is just verbal -- you're right, there was verbal testimony about this, and but I don't mean to be repetitive. What I don't quite understand about your argument is you keep talking about the industry standards but there seems to be a reluctance to put them in writing so that at some point --

MR. MURRAY: No --

THE COURT: It's like the AICPA, you know, Certified Public Accountants --

MR. MURRAY: We can put them in writing --

THE COURT: What?

MR. MURRAY: They can easily be put in writing.

THE COURT: Well, I would like to know whether your clients would authorize you to do that and that would be an -- and I could consider that as a less restrictive alternative.

MR. MURRAY: Sure, I'm happy to get that authority and I have no doubt that they would --

THE COURT: All right, well, I would be interested

in your doing that.

Okay, all right, Ms. Wyer, your turn.

MS. WYER: Your Honor, the problem here is that there is no monolithic or homogenous adult industry, and that is clear from the evidence at trial, that there are these -- there's thousands and millions of supposedly adult film images and films and videos that are put up by anyone and a ruling that assumes that there is some industry standard just creates a huge loophole.

THE COURT: Well, let me be specific. Suppose Mr. Murray comes back with a proposed industry standard as I have requested that he consult with his clients about. And you have a chance to comment on it and whether you agree or not, let's say that after a discussion on this, that I come up with a standard and I consider that, that's within the ambit of the remand to me. And I void the statute as to producers who agree in writing to adhere to this statute. But the statute remains as to a producer that doesn't adhere to it.

Now, is that acceptable to the Government as a less restrictive alternative under strict scrutiny?

MS. WYER: No, Your Honor, because there's no enforcement mechanism for the standard --

THE COURT: Well, there is, if they violate the standard they can be prosecuted criminally for employing a performer under the age of 18.

MS. WYER: But Your Honor, the whole purpose of these requirements is that they serve as a prophylactic measure to make sure that age verification occurs before the --

THE COURT: Well, that would be part of the standard. Mr. Murray says they do that already. They're sure, they get some satisfaction, but it's about -- they satisfy themselves. There's some subjectivity to it, and I agree with you, you've argued that some teenager who was after the money could get a phony birth certificate or they get a phony passport, there are a lot of possibilities to people today. But listen, that's why we have thousands of criminal cases in our country every year because we have laws about crime but people still go about committing crimes.

So there are probably going to be some adult producers who violate the law, all right? But they're running a risk of going to jail, just like somebody who shoplifts or murders somebody, you know, runs the risk of going to jail. You know, society is not perfect.

Now, Congress went to a lot of effort to draft this statue, but the Third Circuit has now set that it's subject to different standards that are very hard to meet.

So one alternative that I have to consider is a less restrictive alternative. If the Third Circuit felt that this statute on its face was unconstitutional, I think there's some

chance they would have said that instead of remanding it. But they specifically remanded it for me to consider less restrictive alternatives because that's part of the strict scrutiny.

So I think I've got to go through this dialogue. Now if you've got a case that says I'm wrong, I'll read it and I'll be -- I'll think about it, but answer my question. Thank you.

MS. WYER: Thank you, Your Honor.

There's two issues here. There's the organizational plaintiffs and there's the other plaintiffs.

With respect to the individual plaintiffs who have their own production that we have seen presented at trial, I would strongly steer the Court away from this certification idea, and if the Court really is compelled to look for a less restrictive alternative, we would prefer to be frank and honest. We would prefer that the Court hold the statute unconstitutional as applied to depictions of these performers who are everyone and those depictions of these producers for everyone in the --

THE COURT: But wait, Mr. Murray went through, in his brief he went through a list of possible less restrictive alternatives. And you rejected everyone of them in your brief.

MS. WYER: Yes, Your Honor, and I have explained

here why we thought the age, the age cutoff was not really less burdensome, that at the same time if the Court were going to choose among those, that is the one that the Government would urge the Court to do on an as applied basis as applied to these individuals --

THE COURT: And what do you think the age cutoff should be, 30?

MS. WYER: That seems to be what the Third Circuit's opinion is --

THE COURT: You think I have the power to do that?

MS. WYER: Yes, we do, Your Honor, because the -- in a facial -- I mean, an as applied challenge is looking at the individual plaintiffs, and there are, for example, the breadth of remedy in an as applied challenge is to find something unconstitutional in a particular case. And what the Court's goal is, is to enjoin only the unconstitutional applications of a statute while leaving other applications in force.

This is -- for example, the Third Circuit's 2016 opinion in Constitution Party of Pennsylvania 824 F.3d 386 says that it's the breadth of the remedy in the as applied challenge that is the important factor.

Now, when you're looking at these organizational plaintiffs, the problem with them being plaintiffs in the as applied challenge is that they -- the participation of the members is still necessary in an as applied context.

The plaintiff has not cited any strict scrutiny analysis by the Supreme Court where the challenge was an applied challenge. Those are all facial challenges that the plaintiff has identified.

In an as applied challenge, the Third Circuit's opinion in the Binderup decision, 2016 Binderup decision states the well settled principle that unlike a facial challenge, an as applied challenge does not contend that the law is unconstitutional as written but that its application to a particular person under particular circumstances is unconstitutional.

And when you're looking at remedies, the Court's, the Supreme Court's decision in Booker did something similar where it held the sentencing guidelines unconstitutional as applied to the plaintiff in certain respects, leaving most of the guidelines intact but simply doing away with one part of it and --

THE COURT: That's a very unusual case that I think is a so-called one-stop case. I don't think that that problem -- that resolution is really applicable in a First Amendment issue. It's an imaginative argument though.

MS. WYER: Well, Your Honor, for example, the Boddie v. Connecticut decision, the Court --

THE COURT: Which one is this?

MS. WYER: It's a 1971 Supreme Court case, Boddie v.

Connecticut, B-O-D-D-I-E, where the statute at issue was a state requirement that people pay for their divorce proceedings, and that was a class action and the Supreme Court held that it was unconstitutional only as applied to the class, which were indigents who could not pay.

So it held the statute unconstitutional only as applied to the plaintiffs who in that situation happened to be an entire class, but it did not invalidate the requirements as a whole. And it did not invalidate any aspect of the requirements other than that one requirement that they pay a fee. It didn't simply invalidate divorce proceeding statutes on their face.

THE COURT: Let me just get a brief answer to question number 6. And that is, changes in technology since the statute was enacted and possibly changes in public taste or community standards, are they at all relevant, and if so, should the factual record be open for testimony on these? Mr. Murray, any viewpoints on that?

MR. MURRAY: Well, Your Honor, I think we put in a lot of evidence. It's four years old, the 2013 we did the trial, we put in all of the evidence of what the technology was currently and how it applied to current technology. I don't think that technology has changed that much since 2013. And to the extent that it has changed, it is similar to the type of technology that we tried the case on back in 2013.

So I don't think -- I can't think of anything in particular that is materially different technologically --

THE COURT: Well, 2013 is certainly a lot different than -- when was the statute passed, 19 --

MR. MURRAY: Well, originally 1988 but ultimately it didn't go into effect until '95 and then it was amended in '08, I think, if I'm not mistaken, when they added the simulated sex --

THE COURT: Right.

MR. MURRAY: But I thought, Judge, that we did try to keep, try to update the situation as of 2013 when we tried the case instead of as of 1995. And so I think the record is pretty good on how the statute affects --

THE COURT: What about changing taste or community standards?

MR. MURRAY: Well, I'm not sure how that's relevant necessarily.

THE COURT: Okay, I just wanted to ask. Government, do you have any views on that?

MS. WYER: Your Honor, in this case we agree that those kinds of issues I think were present in the Macaws case because the terminology used in that statute whereas here we're only talking about the statutory definition of child pornography as it was imported into the age verification standards and there's no similar issue of community standards

here.

The technology, I think that already was highlighted in the trial and that's one reason that it's clear that there is no monolithic adult film industry that you can speak of.

And again, going back to organizational standing and Your Honor's notion of industry standards, we had Barbara Alper here in the trial who was a member of the ASMP testify that she did not check ages of performers and that's because her goal was, was actually not to do that.

And so whatever -- and Mr. Mopsik testified on behalf of ASMP that he could not require his members to do anything. There's no certification required or you know, certification in the sense of to join these organizations. There's no licensing going on here that you can identify someone as a member of this industry because they engage in certain practices or not.

And Mr. Douglas at trial testified similarly that he had no control over his the FFC's members' conduct and he also testified about the way in which the membership of FFC swelled in anticipation of certain litigation decisions with the idea that people -- producers can just join these organizations in order to get the benefit of the Court's decision when they are not really part of any identifiable industry because there is simply no uniform requirements to belong to this.

As the Third Circuit said in, when looking at

whether the production of sexually explicit depictions was a closely regulated industry, anyone can pick up a camera or a video camera and make these images, and you don't have to be -- there is no defined industry and it's all on the internet and anyone can make that. There are not --

THE COURT: All right.

MS. WYER: -- there's just no way to enforce it. And ASMP and FFC do nothing to monitor or enforce the conduct of their members. And that's why they should not -- they should be held not to qualify as plaintiffs for the -- to have standing in the as applied claims.

THE COURT: All right, I'm gonna take a ten-minute recess and then when I come back I'll give you each a chance to sum up or address any of the other questions I didn't specifically cover, but I really think we covered most of them.

I just want to make this observation, Ms. Wyer, you know. I don't think you agree with me about this but my tentative thought about this is I have to consider less restrictive alternatives under strict scrutiny as part of the analysis. And in my view, that is a different test than applies under intermediate scrutiny. It's a more burdensome test.

And since the Government has the burden, at least as to the as applied if not both standards, you know, I'm -- I'll

give you another opportunity to revisit your disinterest in introducing any more evidence but I mean my tentative thought is if you're just gonna stand on the record as it stands now, I think I have problems in considering less restrictive alternatives as the record exists, because it was introduced under a different standard.

And I'm -- if your point is I've got to go back and look at all that testimony and apply strict scrutiny to it as to whether there are lesser alternatives, it's a different kind of way, and I don't think it was fully addressed in your brief.

And you know, if you -- so if that's your position, I'd like to know if you want to file another brief where we go through specific testimony where you thought you met the burden under strict scrutiny, or whether after considering my questions and the argument today, whether you want to reopen the record and introduce some other testimony in an effort to satisfy your burden under strict scrutiny.

I'm not gonna ask for your answer today. One of the questions is gonna be how much time you want to respond. And the same thing with Mr. Murray, how much time you'd like to get back about the industry standards and things like that, and I'll also allow you to file any supplemental briefs on any additional cases.

Okay, so ten-minute recess and then we'll come back.

Thank you.

(Off the record at 3:19 p.m.)

(On the record at 3:29 p.m.)

THE COURT: Okay. Thank you, please be seated. All right, I have to leave shortly. I have a class to teach at Penn Law School so if I can give each of you four to five minutes, something you haven't said yet that you think is important or how much time you'd like for this further submission or briefing or whatever.

Okay, Mr. Murray.

MR. MURRAY: Your Honor, in the --

THE COURT: And I think your arguments have been very good and your briefs were good, and I understand the importance of the case and I'm gonna do my best to sort through it.

But I really want another submission on the questions that I've asked about the less restrictive alternative from both of you. Go ahead. And I'd like you to at least think about the possibility of some kind of settlement that might be fair to both sides. Yes.

You know, both -- you're both in the same ball park. You both want to protect children against participation in adult pornography. It's a question of how strict the standards have to be, and this is something to me that could be resolved by a consent decree, and I would have jurisdiction

to review it or to deal with violators that if there wasn't a criminal prosecution, if it was a civil one. You know, I could see a very fairly simply consent decree that would cover all this.

Go ahead, Mr. Murray.

MR. MURRAY: Your Honor, then just in the few minutes left, I just want to focus on a couple more of the lesser restrictive alternatives.

THE COURT: Please.

MR. MURRAY: And one of them is -- and again, if Your Honor is gonna have to rule on the constitutionality of the statute, then obviously these are gonna have to be considered; a law limited to commercial producers is obviously less restrictive.

THE COURT: Well, would that satisfy you?

MR. MURRAY: No, Your Honor. What I'm saying though is in terms of the -- we'll discuss with the clients what Your Honor is talking about --

THE COURT: And I would like a definition of commercial producers. Not now but in your submission. Go ahead.

MR. MURRAY: I'll give it to you. It's the one that the Government said would be fine with it, for sale or trade.

THE COURT: All right.

MR. MURRAY: And as a matter of fact, by the point

is that's a lesser restrictive alternative that makes the statute unconstitutional under strict scrutiny.

As a matter of fact, in your own opinion, you said that if you could disagree with the Third Circuit on whether it should be construed to be only limited to sale or trade, Your Honor said that that would fully accomplish the goals of Congress.

If that's true, then this statute cannot stand because the Government agrees that that would satisfy the Congress, Your Honor agrees, it's a less restrictive alternative and therefore Your Honor, if you have to write an opinion and deal with these issues, I don't know how the Government escapes the finding that the statutes are unconstitutional in that regard.

And what about secondary producers? Why are they even involved in this law and why wouldn't it be less restrictive to apply it only to primary producers?

In order for the Government to meet its burden of proving that they need secondary producers, they would have to prove that even if primary producers comply with 2257, got the IDs, put the label on the expression, that still minors would be used in productions, and the secondary producers would solve the problem, I don't know how. They couldn't solve the problem.

So that's a lesser restrictive alternative.

And I won't belabor the points in the brief, Your Honor, other than to say the burden is on the Government. Strict scrutiny is hard to meet as the Supreme Court has said over and over again, it's a rare case where strict scrutiny has been met by the Government.

These set of statutes don't meet it. I understand your concern, Your Honor, about protecting children. We want to protect children as well, but the fact remains that what we have here is a set of unconstitutional statutes.

And I know Your Honor is worried that if it's struck down, somehow or another that's gonna lead to teenage underage persons being in adult productions. I don't think that would be the case. I think the people who would do that are the same people who are gonna violate the child pornography laws anyway, the same people who aren't gonna comply with 2257. Like you said, there's always gonna be law breakers. But you know, they've only had nine cases under 2257 since 2002, nine. And they've had thousands of successful child pornography cases where people are sentenced to 10, 15, 20 years in prison.

THE COURT: I'm well familiar with that.

All right, Ms. Wyer.

MS. WYER: Your Honor, there are two claims. There's the as applied strict scrutiny claim and there's the facial over-breadth claim.

And with respect to the as applied claim, it's important to limit any relief to the plaintiffs before the Court and not provide relief broader than necessary to address the as applied challenge.

It's also important to recognize that the plaintiffs are not burdened because none of the plaintiffs produce only purely private depictions, that should not really be part of the analysis when you're talking about an as applied challenge with respect to these plaintiffs.

And when you go through these alternatives, we do want to point out that the Government does think that some of these alternatives would really undermine the statute, such as eliminating criminal penalties. That would basically make the statutes unenforceable and would basically be equivalent to removing the requirements altogether because they would become purely voluntary.

And the same is true when you void any requirement to document by keeping records, that simply makes it impossible to verify whether these requirements have been complied with.

THE COURT: How much time do you want, two weeks, three weeks, 30 -- I don't want to rush you. It's an important case, to get back to me on my questions.

Mr. Murray?

MR. MURRAY: Are you looking for more -- I don't

think I need more briefing. I'll be happy --

THE COURT: No, I don't want more briefs but I'm not gonna foreclose you from citing a case. But I'd like to know what your position is on industry standards and if you want to submit something --

MR. MURRAY: I'd like three weeks for that so that I have time to do it.

THE COURT: Three weeks, done, fine. Is that all right with you, Ms. Wyer?

MS. WYER: Maybe four weeks.

THE COURT: Four weeks, fine. Okay. So I'd like you, how about within three weeks you'll submit something to each other, or you'll submit the standards and you'll submit whatever you want to do, if anything. I mean, four weeks, so that will be October 28th, that's a Saturday, so Friday, October 27th, okay?

MR. MURRAY: Yes, Your Honor.

MS. WYER: Yes.

THE COURT: You'll submit something by then. All right, thank you very much -- what?

MS. WYER: Your Honor, can I clarify exactly what you are wanting in this submission from the Government?

THE COURT: You want me to clarify?

MS. WYER: Yeah, I'm not sure I --

THE COURT: Well, I would like to know -- I'd like

you to consult with your colleagues or whoever is in charge there now about your unwillingness to present any more testimony. I think -- I'm gonna tell you, to be honest with you, I'm gonna have trouble finding that you met your burden on the testimony that's in the record.

MS. WYER: But, Your Honor, the point that we've tried to make is that the alternatives that the plaintiff has identified are not equally effective --

THE COURT: All right, well, then that's another one -- you've got the burden --

MS. WYER: -- altogether or relying on --

THE COURT: All right, look, you can disagree with me. I'm not gonna force you to do it but I'm just telling you that if all you're gonna do is rely on the current record, I'm having -- I thought about this. I'm gonna have trouble finding if that's narrowly tailored or under strict scrutiny. I'm telling you that right now.

So if that's what you want to do, so be it, but don't be surprised if I find you haven't met the burden on as applied.

Okay, I don't know what else to say. I mean, I'm just telling you -- look, this is an important case, and you know, no federal judge, including myself, takes any pleasure out of finding an act of Congress unconstitutional, but I don't think I have a choice, unless you come up with some

better testimony about less restrictive alternatives.

MS. WYER: Well, Your Honor, the alternatives that the plaintiffs have identified --

THE COURT: Well, then you submit some --

MS. WYER: -- do not lend themselves to evidence but you can simply --

THE COURT: Then you tell me what you're suggesting.

MS. WYER: -- analyze them and --

THE COURT: Ms. Wyer, I can't continue this right now, okay?

MS. WYER: Thank you, okay, Your Honor, but --

THE COURT: I'm just telling you it's your burden, so don't keep telling me what the plaintiffs do. It's your burden.

All right, thank you very much. Have a nice day and thank you for coming in.

MS. WYER: Thank you, Your Honor.

MR. MURRAY: Thank you, Your Honor.

(Proceeding concluded at 3:39 p.m.)

* * * *

# C E R T I F I C A T I O N

I, Sandra Carbonaro, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Sandra Carbonaro

Digitally signed by Sandra Carbonaro
DN: cn=Sandra Carbonaro, o, ou, email=dianadoman@comcast.net, c=US
Date: 2017.10.13 10:44:14 -04'00'

SANDRA CARBONARO

Diana Doman Transcribing, LLC

AGENCY

DATE